

Complainant (Dresden)

v.

Respondent

### **I. COMPLAINANT'S CHARGE:**

Complainant, alleges Whistleblowers' Protection Act discrimination and retaliation, that after he repeatedly complained that his employer a) underpaid him, and b) engaged in unsafe and unlawful vehicle inspection practices, he was labeled a troublemaker, and was dismissed.

### **II. RESPONDENT'S ANSWER:**

Respondent, denies the allegation of Whistleblowers' Protection Act discrimination and retaliation, stating that Respondent did not underpay Complainant and did not engage in improper or illegal inspection practices. Complainant was dismissed because he was angry and unfriendly to others, and "although he was a skilled service technician, he was prone to making mistakes."

### **III. JURISDICTIONAL DATA:**

- 1) Date of alleged discrimination: 1/7/08.
- 2) Date complaint filed with the Maine Human Rights Commission: 6/16/08.
- 3) Respondent employs five employees; is required to abide by statutory provisions of the Maine Human Rights Act, the Whistleblowers' Protection Act, and State employment regulations.
- 4) Complainant is represented by Elly Burnett, Attorney.

Respondent is represented by Eric Uhl, Attorney.

- 5) Investigative methods used: a review of the written materials provided by the parties; additional information specific to elements of the charge.

### **IV. DEVELOPMENT OF FACTS:**

- 1) Complainant, the employer, records and documents confirm the following:
  - a) Respondent in Wiscasset specializes in service, sales, and parts for "high end" European automobiles.
  - b) Mr. Complainant was employed as an AST (automotive service technician) from 2/1/05

until 1/8/08 when he was dismissed. Complainant and another service technician, Mr. AST-2, reported to the Service Manager, Mr. SM, all of whom reported to the owner, Mr. OWN.

- c) In response to a request from the MHRC to provide “a copy of all verbal or written reprimands, warnings, or disciplinary actions issued to the Complainant in the past three years“, there was no record of any disciplinary action taken against Complainant during his employment.
- d) Complainant and other service technicians were paid a standard hourly rate of \$14.50 per hour for performing non-automotive work such as cleaning, organizing the shop, conducting training, and other work not directly related to billable work on a customer’s automobile.

In addition, Respondent paid the service technician an additional production rate of \$12.50 per hour, for a total of \$26.50 per hour, for performing work on a customer’s automobile. Respondent paid the additional production rate based on the number of hours that a particular job should take according to a Service Reference Manual. For example, if the reference manual stated that a certain repair job should take four hours, Respondent would pay Complainant for four hours of work at \$26.50 per hour, regardless of the number of hours Complainant took to complete the job. If Complainant took only three hours to complete the job, Respondent would pay him for four hours of work. If Complainant took five hours to complete the job, Respondent would pay him for four hours of work at \$26.50 per hour, and for one hour of work at \$14.50 per hour.

- 2) The following information is provided regarding Complainant’s Whistleblowers’ Protection Act charge, relating to his pay:

- a) (Complainant)

“During the first year of my employment, I became suspicious that the owner was not paying me for production time when I completed a job quickly. My coworkers noticed similar underpayments in their pay. I questioned (the owner) about the patterns of underpayments of my wages on many occasions, even speaking out at meetings about the issue. Because the owner provided us no documentation about our production time or the standardized length of time it took to complete a job, we had no way to document our time earned. In addition, I had direct deposit, and we routinely received our pay stubs late. We were therefore forced to accept whatever he paid us and when he decided to pay us. My coworkers and I noticed that we were always paid better and promptly during periods when the owner employed office help other than himself to do the payroll accounting“.

(Complainant, through counsel)

- The owner always paid employees the time they showed punched in on a job and sometimes a little bit more in order to appear as if he paid his employees properly. For example, if Complainant had a job that had a standard time period of 10 hours to complete, and he completed the job in five hours, the owner would pay Complainant for six hours. This arrangement shorted Complainant four hours of pay, but would appear to an outsider that he was properly paid because it show five hours clocked in

for a job for which he received six hours pay. Unless someone possessed the knowledge of the auto industry's unique pay standards, and the owner's additionally complex arrangement, and verified not only timesheets, but every separate job ticket to see what actually took place and was paid, no one would likely find any discrepancies.

- “During my second year of employment, I began keeping track of my time independently. In December, 2006, I was not paid for one whole pay period. I confronted the owner about this, showing him my pay stub as compared to my records, and he was forced to issue me a second check for the wages I had been shorted.
- The very next pay period, my hourly and production time rates were flipped unfavorably, so that I was paid for more hours at the production rate and fewer at the higher hourly rate. Again I confronted the owner.
- The owner was furious with me for bringing this underpayment in my wages to his attention. He began to refer to me as a ‘troublemaker’ from that point on, and often stated that I had a ‘bad attitude.’ Up until this time the owner appeared to like me and my work.”

b) (Respondent, through counsel)

“Complainant frequently inquired about his pay or complained that he was not being paid the correct amounts. . .” but “the owner (Mr. OWN) always made his weekly reports available” to employees.

c) (Complainant, through counsel)

Contrary to Respondent's assertions, the owner never had time sheets available for employees. Whenever employees requested them, he always had some excuse why he could not provide them. For example, he would tell employees that he was busy at the moment and ask if he could do it tomorrow. The owner would also make employees stay after working hours to try and get a report. Employees often became frustrated waiting and left before getting their pay records, however, because the owner would carry on and on with customers after hours both in person and on the phone. Receiving payroll stubs on payday was the exception, never the rule.

3) The following information is provided concerning Mr. OWN's alleged directives to Complainant and others, to perform unsafe, illegal motor vehicle inspections, in violation of the Whistleblowers' Protection Act, follows:

a) (Complainant's sworn charge)

- Beginning in 2007, “I began to witness and oppose violations of law regarding vehicle inspections at Respondent.
- I am a licensed automobile inspector. On several occasions, if I inspected a vehicle and it failed the inspection, the owner would step in and talk to the customer. The owner would then manipulate the inspection write up and tell another technician to put an inspection sticker on the vehicle without correcting the problem.

- I made it clear to the owner that I refused to break the law, and I had refused to place stickers on vehicles that had failed to pass inspection on previous occasions.
- On one occasion, I caused a vehicle to fail an inspection, noting several problems with the vehicle. Another technician at the shop did some repair work on the car and found additional problems with the vehicle, requiring him to also fail the inspection. Without correcting the additional problems, the owner forged the signature on an inspection sticker, of a technician who (according to the owner still worked part time) and had Ms CP, a cleaning person, place it on the vehicle.

b) ( Ms CP, the cleaning person, provides, in part, the following sworn affidavit)

- In late December, 2007, the owner came to me in the garage with a completed inspection sticker in his hand and asked me to apply it “to a red Volvo, ...the one buried in snow.”
- I went outside as directed and cleared the snow from the red Volvo. The car had sat in the lot since the fall and had accumulated several feet of snow. I got very wet in clearing the car. I applied the sticker as directed.
- When I went back in the garage, an auto technician, Mr. AT-1, asked me where I had been. I explained to him that I had been outside clearing snow and applying an inspection sticker to the red Volvo as directed by the owner. Mr. AT1 got very mad when he heard this. He asked me whose name was on the sticker. I told him that (a former auto technician employee’s) name was listed as the inspector. He immediately walked over and told Complainant what I had told him.
- I noticed (the former employee’s) name was on the sticker when I applied the sticker to the car. I assumed that the owner had forged the former employee’s name on the sticker.
- A couple weeks later, I was eating lunch with Mr. AT-1 and we were discussing the inspection. He told me that I could not apply inspection stickers and that I could get in trouble for doing so. He said this in a protective way because he knew I was only doing what I had been told to do by the owner. He told me that the red Volvo had not passed inspection and that two technicians had inspected it.

c) (Respondent, through counsel)

Apart from the fact that these defamatory allegations make no sense as a practical matter, nothing could be further from the truth.

Respondent is a well respected high-end automobile service center with an impeccable reputation for honest work. As is known by any owner of an automobile service center certified to perform state inspections, a service center would not maintain its certification for long by illegally or fraudulently passing cars for state inspection. Moreover, Respondent charges only the \$12.50 (or \$18.50 for cars in Cumberland County) fee mandated by the state for an inspection. On the other hand, it charges the recommended, and much more costly, service rates for performing service and repair work to address any problems that would prevent an automobile from passing the state inspection. In addition, any service technician who passes a car for the state inspection and authorizes a sticker must sign a log book. It is virtually impossible to forge a technician’s name to authorize a sticker - the technician simply would check the log book and report that he did not sign his name. In short, it does not make any sense, as a matter of law, business, or economics, for Respondent to try to, or have any incentive to try to, illegally or

fraudulently pass cars for state inspections.

d) (Complainant, through counsel)

The owner had every incentive to fraudulently pass cars for state inspections. Apart from the ease in doing so, Respondent caters to high end purchasers and owners of foreign automobiles. (The owner) would have every reason to want to keep these wealthy customers coming back to his establishment, apparently to the extent that bending the inspection rules to please a customer, would not be out of the question.

4) (The following information is provided relating to Complainant's dismissal)

a) Respondent, through counsel:

- From the start of Complainant's employment with Respondent, Complainant proved to be a difficult, sullen, and angry employee who did not take well to supervision, a loner who refused to be part of the team of service technicians. Indeed, on one occasion, Complainant complained to the owner that a newly hired employee was being too friendly with him; Complainant stated that "I came here to work, not to make friends." Obviously, this work attitude concerned the owner, who tried to foster a friendly and interactive workforce. However, whenever the owner approached Complainant to counsel him about his attitude, Complainant quickly became angry and belligerent, making it difficult and even intimidating to discuss any issues with him. Complainant's short-fuse was well-known among his co-workers, who tried to avoid him for the most part.
- Although Complainant appeared to be a skilled service technician, he was prone to making certain mistakes, in some cases costly mistakes that caused Respondent to incur substantial expenses to correct. Again, when the owner tried to discuss these errors with Complainant, Complainant became angry and refused to take responsibility for his mistakes.
- On February 12, 2007, Complainant incorrectly installed a camshaft timing belt on a long-term customer's Audi automobile, resulting in substantial engine damage. Respondent informed the customer of the damage, provided a loaner car and full detail at no cost to the customer, and fully covered the costs of the necessary repairs which amounted to over \$3600. Respondent fully paid Complainant for his time to repair the damage he had done to the car. When the owner tried to discuss the issue with Complainant, Complainant denied responsibility and offered untenable excuses for the problem when in reality it was his faulty work that caused the damage. The owner was very troubled about the incident because—apart from the substantial cost to the company—Complainant seemed unwilling or unable to accept responsibility for his actions.
- Moreover, on numerous occasions after lunch breaks, the owner smelled marijuana on Complainant. When the owner asked Complainant if he had been smoking marijuana, Complainant denied it and stated that he was around some people who were smoking pot. Complainant also failed to pass a required state-mandated enhanced automobile inspection test for Cumberland County, and a Bosch service technician certification examination. In short, Complainant's attitude and hostility, along with his many mistakes and inability to pass the examinations, became too much to bear and, after numerous counseling sessions, Respondent terminated Complainant's employment.

b) (Mr. SM, Service Manager)

In general, I thought that Complainant was a good mechanic. However, it was not uncommon for him to make mistakes or overlook things when he serviced cars. Because of Complainant's volatility, however, I often did not mention these mistakes to Complainant in order to avoid a confrontation and blow up with him.

The owner discussed with me his concerns regarding Complainant's performance and his problems with anger and hostility. The owner asked me for my opinion on occasion about whether Respondent should terminate Complainant's employment. I told the owner that I agreed with any decision to terminate Complainant's employment.

c) (Complainant, through counsel)

- Complainant never received any counseling or record of poor attitude or performance during his three years at Atlantic Motors.
- Every technician, including Complainant and the owner himself, makes mistakes on a vehicle periodically, and he admits that he made the occasional mistake while working for Respondent. He strongly objects, however, to Respondent's intimation that his judgment was impaired because he was smoking marijuana on the job or that his repair work was consistently poor. Most importantly, Complainant never received any warning that his job was in jeopardy due to these alleged performance issues.
- Former employee Mr. AST-2, who also questioned the owner's questionable pay scheme, left Respondent due to the owner's relentless badgering and humiliation of him. Mr. AST-2 told Complainant that the reason he left was for his own sanity, and because he was obviously being cheated on his pay. The owner called Mr. AST-2 a child molester in front of a complete stranger. The owner further slandered Mr. AST-2 to this same person by telling them not to pay attention to him because he is on the sexual offender list. Mr. AST-2 was literally sick to his stomach for days because of this, finally deciding he could no longer work for Mr. OWN.
- Affidavit of former technician Mr. 506

I worked with Mr. AST-2 and Complainant during my employment and witnessed many interactions between Mr. OWN and each of these technicians. I witnessed Mr. OWN state that Mr. AST-2 looked like a child molester. I told him that was a terrible thing to say. He was extremely mean to Mr. AST-2 and badgered him relentlessly about his work, even though during my employment, Respondent never had any complaint about work Mr. AST-2 had done.

During my employment, Mr. AST-2 hated Mr. OWN with a passion. I am astonished to learn that Mr. AST-2 made a statement in support of Respondent's position in response to Complainant's complaint.

I also witnessed Mr. OWN call Complainant a "retard." On several occasions; Mr. OWN booked more work than could reasonably be completed by the time promised. He would then go into the shop and purposefully rile Complainant up-by shouting

"Now Now Now!" and make other harassing comments while Complainant worked, because he knew that Complainant would respond. He also knew that Complainant stutters, and he would harass and provoke him to purposefully make him stutter in order to make fun of him. I confronted Mr. OWN about this behavior. It bothered me very much.

I have worked with hundreds of technicians, and Complainant was the equivalent of a surgeon. His technical expertise was outstanding. More importantly, Complainant was extremely honest and full of integrity. I had great respect for Complainant. From working with him, I know that Complainant was meticulous in his inspections. I also know that Complainant tried very hard to get his inspection license and would not take any action that would jeopardize that license.

Mr. OWN refused to wait on Jewish customers, gay or lesbian customers, and foreign customers. He made me handle these customers, which I did not mind. Mr. OWN would then make derogatory remarks about these customers behind their backs. I thought this was horrible behavior from a businessperson.

I also know that Mr. OWN would sign and apply inspection stickers himself, when the technicians refused to, due to legitimate violations. He did so during my short employment. I saw him drastically bend the inspection rules for repeat customers who paid the shop well.

I know of one customer in Waldoboro (whom he named) who used to bring a white Saab station wagon to Respondent for servicing. He stopped going there for repairs after Mr. OWN incorrectly installed a new exhaust and then screamed at Complainant for having done so, in front of the customer. When Mr. OWN learned that the client was upset that he had yelled at Complainant unfairly, Mr. OWN brought Complainant out in front of the customer to apologize in order to keep the customer's business.

I left Respondent because of Mr. OWN's dishonesty. The final straw for me was a situation involving an ignition module recall from Saab. Saab recalled certain ignition modules Respondent had in stock. When Saab sent replacements, rather than return the recalled modules, Mr. OWN would keep and repackage the old recalled module. I witnessed him install a recalled module on a customer's car and charge retail for it. I wanted no part of this unsafe and unethical behavior, so I quit my employment.

- (Complainant through counsel) Against the backdrop of this outrageous behavior, it is easy to see how Complainant would become a target for the owner's ridicule and hostility after having made complaints to him about illegalities and unsafe conditions in the way he ran his shop.

The bottom line is that the owner made the work environment extremely hostile when Complainant began making reports about unpaid wages and refused to perform illegal and dangerous inspections. It is telling that Respondent's list of problems with Complainant's behavior and work, begin in 2007, as the timing corresponds precisely with Complainant's whistleblower complaints. When the owner could not force Complainant out with his abusive language and intimidation over a three month period, and Complainant continued to object to what he perceived to be illegal and unsafe practices and conditions, the owner fired him.

## V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to “determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 M.R.S.A. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) Title 26 M.R.S.A. § 833, the Whistleblowers’ Protection Act provides, in part, “No employer may... discriminate against an employee ...because the employee, acting in good faith, reports...to the employer...what the employee has reasonable cause to believe is a violation of a law...adopted under the laws of this State...[or] has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee.” 26 M.R.S.A. § 833(1)(A) & (B).
- 3) Here, Complainant, Complainant, alleges, and Respondent, Respondent, denies, that Complainant was dismissed because of, or in retaliation for, Whistleblower activity.
- 4) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he engaged in activity protected by the WPA; he was the subject of adverse employment action; and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in “close proximity” to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.
- 5) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. *See Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then “produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action.” *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry his overall burden of proving that “there was, in fact, a causal connection between the protected activity and the adverse employment action.” *Id.*
- 6) Consideration of the information, documents, and records provided reveals the following:
  - a) Complainant is able to establish a prima facie showing of adverse action/retaliation.
    - He complained, in good faith, of being underpaid, and made it known to the owner that he disapproved of the owner’s disregard for vehicle inspection laws.
    - He was dismissed.
    - The dismissal occurred in close proximity, a few months, after his complaints of what he “had reasonable cause to believe” to be illegal pay shortages and unsafe practices and conditions.
  - b) The employer responds that Complainant’s termination “had nothing whatsoever to do with his alleged complaints and everything to do with the fact that he failed to perform his job adequately, failed a required certification examination, and was a disruptive and uncooperative force in the workplace who, despite several warnings and opportunities to



improve his attitude and performance, simply was unwilling or unable to comply with Respondent's legitimate expectations for the job."

- c) Complainant is able to rebut each of Respondent's purported reasons for dismissal and show that there was, in fact, a causal connection between his protected activity and his termination.
- With regard to the assertion that Complainant failed to perform his job adequately, Complainant, through counsel, points to Respondent's written statement to the MeHRC; the Respondent's affidavit by the Service manager; and an affidavit of a technician, Mr. 506, who quit early in Complainant's employment.
    - "Complainant appeared to be a skilled service technician" who made certain mistakes. (Respondent's statement to the MeHRC)
    - "In general, I thought Complainant was a good mechanic." (Service Manager's affidavit)
    - "I have worked with hundreds of technicians and Complainant was the equivalent of a surgeon. His technical expertise was outstanding." ( Mr. 506, former coworker)
  - With regard to the assertion that Complainant "failed a required certification examination," Complainant states that he and the other automotive service technician, both failed the exam, but passed it the second time.
  - With regard to Complainant being a "disruptive and uncooperative force in the workplace, or unwilling or unable to comply with expectations of the job," Complainant notes that his alleged misconduct/attitude did not rise to the level of seriousness to warrant any record of discipline. Complainant admits that he was angry at times at having to deal with the almost daily abuse ("retard," "troublemaker") that existed toward the end of his employment.
- d) Complainant's successful rebuttal of each of the articulated reasons given for his dismissal, demonstrates that such reasons are unsupported by facts, and merely a pretext for unlawful Whistleblowers' Protection Act discrimination.

It is found that Mr. Complainant was unlawfully terminated because of his open and outspoken opposition to improper wages paid, and unsafe, unlawful inspection sticker practices.

## **VI. RECOMMENDATION:**

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that Mr. Complainant was subjected to retaliatory dismissal by Respondent in violation of the Whistleblowers' Protection Act.
- 2) That Conciliation be attempted in accordance with 5 M.R.S.A. § 4612(3).